Opening Pandora's Hotbox: Residential Landlords and Proposal 1

Brandon M. H. Schumacher

Foster Swift Finance Real Estate & Bankruptcy Law News

May 24, 2019

AUTHORS/ CONTRIBUTORS

Brandon M. H. Schumacher

PRACTICE AREAS

Landlord-Tenant

Real Estate Law

Real Estate Litigation

On November 6, 2018, Michigan became the tenth state to legalize cannabis for recreational use, known as Proposal 1 ("Prop 1"). Prop 1 legalized, among other things, the consumption of cannabis for individuals 21 years or older, allows individuals to grow up to 12 cannabis plants, and permits an individual to possess up to 2.5 ounces of consumable cannabis on their person with up to 10 ounces stored at a person's residence subject to certain storage requirements.

Prop 1 went into effect on December 6, 2018, but the Legislature and the Department of Licensing and Regulatory now have until December 6, 2019 to set up procedures for the licensing of recreational cannabis businesses.

While Michigan's population is still waiting to see how Prop 1 will be implemented, Prop 1 has already forced a subset of Michigan businesses – residential landlords – to face the legal uncertainty of conflicts between Michigan law (which allows for personal cannabis use but prohibits commercial sale of recreational cannabis at least until December 6, 2019) and federal law (which prohibits cannabis use altogether). Prop 1 applies to all landlords; there is no distinction between the single property manager and the large, multi-unit, commercial complex. Specifically, a residential landlord must answer this question: Should I follow Michigan law or federal law? The answer is not as simple as choosing one over the other.

First, Prop 1 does permit a landlord to prohibit smoking cannabis at leased property. However, landlords cannot prohibit a tenant from consuming cannabis on the property in manners other than smoking under Prop 1. Second, Prop 1 does not prevent landlords from prohibiting a tenant from establishing a commercial cannabis operation on the property.

Prop 1 "allows a person to prohibit or otherwise regulate the consumption, cultivation, distribution, processing, sale, or display of marihuana and marihuana accessories on property the person owns,

occupies, or manages, except that a lease agreement may not prohibit a tenant from lawfully possessing and consuming marihuana by means other than smoking." MCL 333.27954. Yet, possessing cannabis, regardless of the method of consumption, remains illegal under federal law.

Compliance with Prop 1's provision appears straightforward, but a residential landlord's obligation under a lease agreement becomes hazy when considering the conflict between federal law and Prop 1. Whether one agrees or disagrees with cannabis' classification as a Schedule I drug, the fact is cannabis remains illegal under the federal Controlled Substances Act.

As cannabis remains illegal under federal law, it has now become the unruly third-roommate implied in every residential lease agreement. At the forefront, residential landlords that are primarily affected by conflicts between Prop 1 and federal law are those who participate in the federal housing programs, such as Section 8. Federal law controls the Section 8 program, and includes required provisions relating to illegal-drug use—which includes cannabis. Unfortunately, Michigan law prohibits a landlord from including these provisions for smoke-free cannabis products.

What is a residential landlord to do? Disregard Michigan law to maintain its current tenant base of Section 8 renters, or stop taking Section 8 vouchers altogether to comply with Michigan law? What liability can the landlord face for non-compliance with either law? These are difficult questions with complex answers. Hopefully the Michigan Legislature will address some of these conflicts in the near future.

Still, even landlords that choose to abandon Section 8 – or any other federal housing program – to comply with Michigan law do not immunize their lease agreements from potential federal consequences.

The Civil Asset Forfeiture Reform Act, a federal drug law, may result in law enforcement seizing and liquidating a residential landlord's house or complex.

Indeed, a residential landlord could potentially waive defenses available to asset forfeiture by mere compliance with Michigan law. Federal forfeiture is an extreme legal remedy that may be unlikely to occur for mere possession of cannabis on a rented property, but always remains a residual risk for landlords, especially those that choose to allow commercial cannabis operations in the future.

Of course, the issues outlined above still do not account for the myriad of other foreseeable legal problems residential landlords may face on a daily basis from a tenant's cannabis use. Damage to the unit, interference with other tenant's quiet enjoyment of the property, increased maintenance or insurance costs, and the increased cost of crime prevention or security, among other things, are just some of the landlord-tenant relational conflicts that may arise because of Prop 1. In sum, as it currently stands Prop 1's impact on the landlord-tenant relationship is not fully known and has pushed this area of law into uncharted waters.

Residential landlords are well-served to work with a knowledgeable attorney to help navigate Prop 1's intersection with federal law, whether by assisting with an updated lease agreement, Section 8 advice, advising on landlord-tenant disputes relating to cannabis use, potential asset forfeiture and defense, or complex issues presented by the conflict between federal law and Prop 1.

If you have concerns and would like to discuss the legal perils for landlords created when Prop 1 opened Pandora's HotBox, contact Brandon Schumacher at 517.371.8255 or at bschumacher@fosterswift.com.